Supreme Court, U.S.
FILED

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No. 06-557

IN THE

Supreme Court of the United States

URBAN BRANDS, INC.

Petitioner,

v.

EVELYN RODRIGUEZ-OQUENDO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The real and true question in this case is whether a non-purchasing corporation of a debtor's assets, has standing to question, intervene, and try to set aside the execution of a validly rendered judgment in default by a state court; judgment which was entered after service, notice and an opportunity to appear before the state court was given to the purchasing corporation, having chosen said buying corporation not to appear before the state court and claim and present the defense of 11 USC § 363(f) presented to this Supreme Court.

STATEMENT AS TO THE PARTIES

According to the Bankruptcy documents presented by Petitioner Urban Brands, Inc. in state court, she was not the corporation that bought debtor's assets, it was a **Urban Acquisition Corp.** No plausible explanation as to Urban's standing was presented before any of the stages of the proceeding in state court, even though Respondent has repeatedly questioned said standing.

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JURISDICTION

Petitioner under color of 28 USC § 1258 attempts to make a collateral attack on a valid judgment rendered on matters of state law.

The federal law issue now raised in this Court was not squarely presented to the Court of First Instance, Superior Section of Ponce, Puerto Rico, at the first opportunity petitioner had, since Petitioner Urban Brands Inc. [or Urban Acquisition Corp] chose not to answer the complaint served on them for which judgment in default was rendered, having waived any statutory defense that may have being available to her under § 363(f) of the U.S. Bankruptcy Code at that time, and furthermore, since the state court judgment was never appealed nor set aside under state law.

STATEMENT OF THE CASE

Respondent Evelyn Rodríguez was employed with her former employer Petrie Retail, Inc. d/b/a Marianne for 18 years. On October 15, 1998 she was summarily dismissed and fired. A younger women was hired in her place.

On or about October 12, 1995, 3 years before Mrs. Evelyn Rodríguez was fired, her former employer filed a petition for bankruptcy under chapter 11 of The U.S. Bankruptcy Code [The Code]. Mrs. Rodríguez was never notified of this filing, nor was she ever included as a creditor or as a potential creditor.

As stated in the judgment of the Supreme Court of Puerto Rico, the evidence presented before the Court of First Instance, Superior Section of Ponce [Court of First Instance] showed that her former employer used 2 different corporate entities to pay her salary, as it appears from the income tax

withholding statements issued to the Treasury Department of Puerto Rico that were presented into evidence during trial. The Corporate structure of her employer was unknown to her.

On or about December 1, 1998, approximately 2 months after respondent was summarily fired, the U.S. Bankruptcy Court for the Southern District of New York, approved amongst other things, a sale of all the Marianne stores of former employer Petrie Retail Inc. in Puerto Rico, to a different corporation than Petitioner, namely **Urban Acquisition Corp,**[1] after which sale Petrie would be, as it was, completely liquidated and dissolved.

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1 Urban Brands Inc. has never satisfactorily explained her relationship if any to **Urban Acquisition Corp.** even though respondent has repeatedly questioned her standing to appear in this suit, Urban has avoided this issue and never gave an answer in state court.

Mrs. Rodríguez was never notified of the proposed sale[2], nor was she ever notified or summoned to a hearing to consider said sale, nor was a public notice given in Puerto Rico to all persons adversely affected by said sale.[3]

Hencefore Mrs. Rodríguez did not appear to oppose said sale, nor was able to take the necessary steps to protect her labor law claims against her former employer Petrie and/or against successor employer Urban Brands Inc. [or **Urban Acquisition Corp.**][4].

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2 11 USC§ 363 (b) requires that trustee give notice and a hearing in sales under 363 (f), *Western Auto v. Savage, 43 F3d. 714.*

3 Petitioner has never contested, denied, or proven to the contrary, this facts presented and proved in state court proceedings.

4 According to 11 USC § 363(f) all 5 criteria have to be met in order for the sale to proceed. Puerto Rico's law as per the Supreme Courts decision herein questioned, does not permit the sale of debtors property free and clear of lien, so the criteria of "*if applicable non bankruptcy law permits sale of such property free and clear of such interest...*" is not met in this case. -*Fairchild Aircraft v. Cambell, 184 B.R. 910.*

After the sale Urban Brands Inc. [or **Urban Acquisition Corp.**] took over all Petrie's Marianne's stores in Puerto Rico and its corporate offices at **150 Meadowlands Parkway Secaucus, N.J., 07094.**

Marianne's stores in Puerto Rico were kept and operated by petitioner and/or **Urban Acquisition Corp.**, in the same way and manner they had been operated by former employer Petrie during the last 18 years. Petitioner and/or **Urban Acquisition Corp.**, kept the store's name, namely Marianne; kept the same administrative personnel; same identifying colors and designs of the store; the same style of merchandise was sold; same physical location of stores were kept; same Bank and bank accounts were kept; same layout and business concept was advertised.

In sum there was no significant difference between businesses.

No public notice was given in Puerto Rico that Urban Brands Inc. [or **Urban Acquisition Corp.**] had acquired all of Petrie's Marianne stores in Puerto Rico.

Furthermore, it was discovered during execution that Urban Brands Inc. and **Urban Acquisition Corp.** are not registered in the Department of State of Puerto Rico as a domestic or foreing corporations as the law requires, and as such are not admitted to do business in Puerto Rico.

On September 29, 1999[5] Mr. Rodríguez filed a labor law suit or complaint against her former employer, not knowing that he had sold all his assets and interests in Puerto Rico in Marianne's stores.

In said complaint Mr. Rodríguez claimed a wrongful dismissal and an age discrimination action. The suit was filed

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5 Under Puerto Rico laws a employee has 1 year to file an age discrimination suit, and 3 years to file a wrongful dismissal suit, *Matos Molero v. Roche Products, 132 DPR 470.*

under state labor law's summary proceedings.

Summons were issued on October 5, 1999 and Petitioner was **personally** notified on October 15, 1999.

Service of process was served personally on Petitioner's store manager where Mrs Rodriguez had worked for years, and from where she had been summarily dismissed.

Petitioner instead of appearing before the Court of First Instance, and answer the complaint chose (1) not to appear at all; (2) chose not to claim or present the affirmative defense now asserted in this court under § 363 (f) of the U.S. Bankruptcy Code; and (3) chose to keep silent as to the fact that she or **Urban Acquisition Corp.**, had bought all of Marianne's Stores in Puerto Rico free and clear of liens from former employer, Petrie.

Having elapsed more than enough time to answer the complaint, and having chosen petitioner not to appear and defend herself

in state court, default was entered on May 25, 2000. Petitioner was notified of this action.

On April 23, 2001 a bench trial was held before state court in Ponce. Even though under default, evidence was required to be presented to the court, *Díaz v. Wyndham, 2001 TSPR 141*. Respondent presented several documents and her testimony at said trial.

On June 7, 2001, petitioner was notified of the judgment rendered in this case against her, to her corporate address at 150 Meadowlands, Parkway Secaucus, N.J. 07094.[6]

Even though petitioner was notified of the judgment rendered in this case, she chose once again to keep silent, and did not appeal the judgment; did not request a reconsideration of the judgment; nor requested that said judgment be set aside; as

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6 Although petitioner in state court denied that this was her address, evid ce found in its banks accounts when they were attached proved her wrcng.

it is recognized and authorized by state law, 32 L.P.R.A. Ap. III R. 49.2; 32 L.P.R.A. § 3124; Secretario v. Tribunal Superior, 91 DPR 864.

When respondent started execution of the judgment rendered, and when she attached a bank account in the name of ***"Urban Brands, Inc., Marianne Division, 150 Meadowlands Parkway, Secaucus , N.J. 07094"***, in Scotiabank of Ponce, Puerto Rico, petitioner Urban Brands Inc., not known purchaser **Urban Adquisition Corp.**, immediately appeared before the Court of First Instance, requesting that the execution be stayed because she had never being served with process in this case, nor had she ever been notified of the judgment rendered in this case. Both assertions were also proven wrong in the Court of First Instance.

The Court of First Instance, held lengthy hearings to consider petitioner's

claim that the execution be stayed and the judgment be set aside to prove that Mrs. Rodriguez had been justly dismissed.

The Court of First Instance, after careful consideration of petitioner's collateral attack on its court judgment dismissed petitioners claim concluding amongst other things, that petitioner was not only duly served with process in this case and had chosen not to answer the complaint, so she had forfeited or waived all affirmatives defenses to the complaint; but that by not appearing before said court she was stopped by law to question the judgment rendered, since she had not timely appealed, nor timely requested reconsideration; nor had timely requested that the judgment be set aside. Petitioner was adjudged a successor employer of Petrie, bound by state public policy against wrongful dismissal and age discrimination, see appendix C of Petitioners

Petition, pp 35a-46a.

It was held that by petitioner being found a successor employer she was subject to the laws of Puerto Rico and could not at this stage of the proceedings collaterally attack a valid judgment entered against her in default, *Brown v. Trustees of Boston Univ., 891 F2d. 337, cert. denied 496 US 937.* Her appearance at the stage of execution of judgment to contest said judgment was untimely and barred, Carestates Leasing Inc. v. Wright-Way Exp. Inc., 190 F.R.D. 356; Wright & Miller, 5A Federal Practice and Procedure § 1391.

The Supreme Court of Puerto Rico affirmed the Resolution of the Court of First Instance, and denied petitioners request that the execution of the judgment against her be stayed or stopped, see appendix A of Petitioners Petition, pp.1a-19a.

Puerto Rico's Supreme Court also

resolved as a matter of public policy that under state law debtors assets could not be sold free and clear of liens in detriment of an employees constitutional rights no to be subject to age discrimination, and under the law not to be unjustly dismissed form employment. The Supreme Court held that this case was a matter of Puerto Rico's employment public policy

Reasons For Denying The Petition

Petitioner is not entilled to a legal remedy in this case, because she chose not to appear before the Court of First Instance, and defend herself, bringing before that court as a matter of an affirmative defense against the complaint, 11 USC § 363 (f) of the Bankruptcy Code, as it is required by the law in Puerto Rico's, *32 L.P.R.A. Ap. III R 6.3; Díaz Ayala v. E.L.A., 153 DPR 675*[7]*; Alamo*

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[7] *Nycol Corp. v. Troco PLC, 949 F. Supp. 1[illegible]5; Mc Intosh v. Antonino, 71 F 3d. 29; Eberhardt v. Integrated Design, 167 F 3d. 861; Romstadt v. Allstate*

Pérez v. Supermercado amigo, 2002 TSPR 116.

Herein appearing respondent would be left with no legal remedy for her claim, since long ago her former employer was liquidated without her knowledge [without a notice and a hearing].

Petitioner's lack of diligence or bad faith cannot be used in her favor.

By choosing no to answer the complaint and defend herself; by choosing not to appear at the trial and defend herself; by choosing not to appeal the judgment, nor request reconsideration of the same; or request that said judgment be set aside; petitioner waived the legal defense now presented before this Supreme Court under 11 USC § 363(f).

Ins., 59 F 3d. 608.

CONCLUSION

The petition for certiorari should be denied, with costs and attorneys fees imposed on petitioner.

Respectfully submitted,

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